IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

W.E.B., a minor child,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 01-499-SLR
	)	
APPOQUINIMINK SCHOOL DISTRICT, and THE STATE OF DELAWARE DEPARTMENT OF EDUCATION,	)	
	)	
Defendants.	)	

Collins J. Seitz, Jr., Esquire and Gwendolyn M. Lacy, Esquire of Connolly, Bove, Lodge & Hutz, LLP, Wilmington, Delaware. Counsel for Plaintiff.

David H. Williams, Esquire and Jennifer L. Brierley, Esquire of Morris, James, Hitchens & Williams, LLP, Wilmington, Delaware. Counsel for Defendant Appoquinimink School District. Louann Vari, Esquire of the Department of Justice, Dover, Delaware. Counsel for defendant Delaware Department of Education.

MEMORANDUM OPINION

Dated: November 21, 2002
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff W.E.B. is a minor child identified as having a learning disability under the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq. During the 2000-2001 school year, plaintiff attended the 7th grade at Middletown Middle School in defendant Appoquinimink School District ("the School District"), located in and around Middletown, Delaware. In February 2001, plaintiff's parents removed him from the Middle School citing defendant's failure to prevent daily harassment and bullying of their son. (D.I. 41 at 4) On February 5, 2001, plaintiff's parents requested an administrative due process hearing from defendant, the Delaware Department of Education ("the Department"). The Department held a hearing pursuant to 14 Del. C. § 1335 et seq. and on July 20, 2001, issued a decision adverse to plaintiff.

On July 23, 2001, plaintiff filed this action seeking an appeal from the adverse ruling pursuant to 20 U.S.C. § 1415(i)(2)(A). (D.I. 1) This court has jurisdiction pursuant to 20 U.S.C. § 1415(i)(3)(A) and 28 U.S.C. § 1331. Presently before the court is plaintiff's motion to enforce the stay put requirement of 20 U.S.C. § 1415(j). (D.I. 33)

II. BACKGROUND

Congress enacted the IDEA "'to assure that all children with disabilities have available to them ... a free appropriate public

education which emphasizes special education and related services designed to meet their unique needs.'" Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 68 (1999) (quoting 20 U.S.C. § 1400(c)). The "centerpiece" of the IDEA's education delivery system is the "individualized education program," or "IEP." Honig v. Doe, 484 U.S. 305, 311 (1988). The IEP, the result of collaborations between parents, educators, and representatives of the school district, "sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." Id.

Concerned that parental input into the creation of the IEP would not always be sufficient to safeguard a child's right to a free and appropriate education, Congress included procedural safeguards in the IDEA that enable parents and students to challenge a local educational agency's decisions. 20 U.S.C. § 1415. During the pendency of these administrative proceedings, the IDEA mandates that "unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then current educational placement of such child ...." 20 U.S.C. § 1415(j). "Implicit in [this provision] is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the

parent before the parent requested a due process hearing. To cut off public funds would amount to a unilateral change in placement, prohibited by the Act." Zwi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982).

Until February 2001, plaintiff received instruction and special education services in school at Middletown Middle School. At that point, plaintiff was being instructed pursuant to a September 2000 IEP agreed upon by plaintiff's parents and defendants. (D.I. 42 at B1) Among the provisions of the September 2000 IEP was one mandating that plaintiff continue to be educated in-school at Middletown Middle School. On February 2, 2001, plaintiff's parents removed him from the Middle School amidst allegations of repeated peer abuse and defendants' failure to provide a free and appropriate public education. On February 5, 2001, plaintiff's parents requested a due process hearing and that the School District approve and pay for homebound schooling.

On February 13, 2001, the School District convened an IEP meeting to address plaintiff's request for homebound schooling. However, the School District declined to change plaintiff's IEP from in-school to homebound instruction. Additionally, the Department convened a panel and held a hearing on plaintiff's administrative due process claim. On July 20, 2001, the panel issued a decision adverse to plaintiff. On July 23, 2001, plaintiff filed this action seeking an appeal from the adverse

ruling of the Department in his administrative due process hearing.

During the pendency of this case, the parties convened another IEP meeting on August 29, 2001. At the August 2001 IEP meeting, the parties agreed to change plaintiff's placement from in-school instruction to homebound instruction. (D.I. 42 at B49) The August 2001 IEP was again modified on September 27, 2001, adding additional services but maintaining homebound instruction. Throughout the 2001-2002 school year, plaintiff's 8th grade year, he was home-schooled at defendants' expense.

On September 17, 2001, the court held oral arguments on a motion to dismiss brought by defendants. While the court denied the motion, it ordered plaintiff's parents to obtain legal counsel to represent their minor son as required by Collingsbru v. Palmyra Board of Education, 161 F.3d 225 (3d Cir. 1998). (D.I. 18) After plaintiff was unsuccessful in obtaining private counsel, the case was referred to this court's Federal Civil Panel. However, it was not until September 13, 2002, that plaintiff was able to obtain willing counsel. (D.I. 31)

During this year-long lapse, defendants began planning for plaintiff's transition from homebound schooling to 9th grade at Middletown High School for the 2002-2003 school year. In April 2002, defendants convened two meetings to discuss plaintiff's transition. On July 16, 2002, defendants convened another

meeting to discuss the transition and develop a new IEP for plaintiff to resume in-school instruction at the High School. Plaintiff's parents did not agree to the proposed July 2002 IEP and refused to sign it or consent to a change from homebound schooling to in-school instruction.

In September 2002, the 2002-2003 school year commenced and plaintiff's parents did not send plaintiff to school. Furthermore, defendants have not continued to provide plaintiff with homebound instruction. On October 17, 2002, plaintiff filed a motion to enforce stay put requirement until the completion of the action in this court. (D.I. 33)

III. DISCUSSION

A. The IDEA's Stay Put Provision

The "stay put" provision of the IDEA is found at 20 U.S.C. § 1415(j) and states:

> [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

"Section 1415(j) establishes a student's right to a stable learning environment during what may be a lengthy administrative and judicial review." Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199 (2d Cir. 2002). The purpose of the stay-put provision is to maintain the status quo during the

course of proceedings and it acts in essence as an automatic preliminary injunction. J.O. v. Orange Twp. Bd. of Educ., 287 F.3d 267, 272 (3d Cir. 2002).

The Third Circuit has held that a child's "then-current" placement should be determined with reference to the last functioning IEP and that placement should be maintained pending resolution of the litigation at least at the district court level. Susquenita Sch. Dist. v. Raelee S. by & Through Heidi S., 96 F.3d 78, 84 (3d Cir. 1996)(citing Drinker v. Colonial School District, 78 F.3d 859 (3d Cir. 1996)).

B. Plaintiff's Proper Placement During These Proceedings

The parties do not dispute that the September 2000 IEP was plaintiff's "then-current" educational placement when these proceedings commenced. The parties also do not dispute that in the August 2001 IEP they "otherwise agreed" to change plaintiff's instruction from in-school to homebound placement. What the parties disagree on is the intended duration of the August 2001 IEP.

Plaintiff contends that the August 2001 IEP was not limited in its duration and should continue to be enforced until the end of the proceedings in this court. Defendants, conversely, contend that the August 2001 IEP was limited to the 2001-2002 school year and, now that the 2001-2002 school year is over, the August 2001 IEP is no longer in force and the September 2000 IEP

providing for in-school instruction is controlling. For the reasons that follow, the court concludes that plaintiff's proper placement during the proceedings in this court is in accordance with the August 2001 IEP, as modified in September 2001.

In interpreting the terms of an IEP, courts have held that the evaluation should be limited to the terms of the document itself. See Knable v. Bexley City Sch. Dist., 238 F.3d 755, 768 (6th Cir. 2001); Union Sch. Dist. v. Smith, 15 F.3d 1519, 1526 (9th Cir. 1994). The parties agree that both the August 2001 IEP, as modified in September 2001, are silent on the duration of the change in placement.

Defendants assert that the extrinsic evidence shows that both parties intended that the August 2001 IEP only be temporary. Defendants point to the minutes from the August 2001 IEP meeting, as well as statements made by the plaintiff's parents throughout the proceedings, to show both parties' intent to limit the August 2001 IEP to the 2001-2002 school year. None of this evidence is convincing. Furthermore, if defendants so clearly intended the August 2001 IEP to apply only to the 2001-2002 school year, they had two opportunities to put such a limitation in the actual IEP agreed on and signed by the parties. Defendants' failure to explicitly place this limitation in either the August 2001 IEP or the September 2001 modifications thereto is unexplained and is fatal to their argument.

Given that the August 2001 IEP and the September 2001 modifications thereto was the last functioning IEP agreed on and signed by all parties, the court concludes that their terms include the proper placement of plaintiff during the proceedings in this court. While the court may ultimately affirm the Department's ruling that in-school placement is the proper placement for plaintiff, until completion of the proceedings in this court, the stay put requirement will be enforced pursuant to the terms of the August 2001 IEP, as modified.

IV. CONCLUSION

For the reasons stated, plaintiff's motion to enforce stay put requirement (D.I. 33) is granted. An appropriate order shall issue.

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

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	)	
Plaintiff,	)	
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APPOQUINIMINK SCHOOL DISTRICT, and THE STATE OF DELAWARE DEPARTMENT OF EDUCATION,	)	
	)	
Defendants.	)	

O R D E R

At Wilmington, this 21st day of November, 2002, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that plaintiff's motion to enforce stay put requirement (D.I. 33) is granted.

Sue L. Robinson
United States District Judge